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THE HONORABLE FRED VAN SICKLE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

JAMES S. GORDON, JR,

Plaintiff,

v.

IMPULSE MARKETING GROUP, INC.,

Defendant

IMPULSE MARKETING GROUP, INC.,

Third Party Plaintiff

v.

BONNIE GORDON, JAMES S. GORDON, III, JONATHAN GORDON, JAMILA GORDON, ROBERT PRITCHETT, EMILY ABBEY, and LEW REED

Third Party Defendants

NO. CV-04-5125-FVS

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR EXTENSION OF TIME TO FILE DEFENDANT'S STATEMENT OF MATERIAL FACT SUPPORTIVE OF DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

Jury Trial Demanded

Request for Telephonic Argument

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COMES NOW the Plaintiff, James S. Gordon, Jr., and hereby objects to Defendant's motion for an extension allowing the Defendant to file another "Statement of Facts," and requests to be heard on this objection via telephonic argument.

Briefly, the Defendant should not be given another opportunity to file a "statement of facts' because it has already filed its statement of facts, see dkt. 109 beginning at page 4. In bringing this motion, the Defendant is attempting to get a "second bite at the apple," because its first filing was so grossly deficient that the Court is certain to dismiss the Third Party Defendants, as the Plaintiff has requested in its motion for summary judgment. This will frustrate the Defendant's strategy of suing the Plaintiff's friends and family as retribution against the Plaintiff for bringing this action. Thus, the Defendant is asking the court to allow it to file yet another "statement of facts" to give it yet another opportunity to shore up its opposition to the Plaintiff's motion. The Court should not allow the Defendant endless opportunities to pursue this strategy.

Couching the Defendant's motion to file yet another "statement of facts" in the context of Defendant's "cross-motion" for summary judgment is simply a ruse,

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as can be seen by examining the substance of the Defendant's "cross-motion for summary judgment." The Defendant's "cross-motion" presents a pure question of law, in which no facts are needed for the Court to render it's decision. The Defendant has simply asked the Court to interpret a statute. The Defendant's "cross-motion" for summary judgment merely asks the Court to rule (incorrectly) that liability under RCW 19.190.010 is limited to "an "electronic mail address and not an internet domain name." Dkt. 87, pg. 25. (internal quotations omitted.) The plain language of the statute is all that is needed to demonstrate that the Defendant is mistaken, and no "facts" are necessary or even relevant for the Court to reach that conclusion. In any event, even if the Defendant wants to argue that there are facts that bear on this question, the Defendant has already had the opportunity to file such facts, and in fact has actually filed a statement of facts. see dkt. 109 beginning at page 4. If the Defendant failed to include facts in its' own filing that bear on its own motion, the Court should not penalize the Plaintiff! The Court should deny the Defendant's the opportunity to file yet another "statement of facts" as such a filing would plainly be unfair to the Plaintiff.

The Court should also deny the Defendant's motion because it is

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procedurally unfair to the Plaintiff and even more unfair to the Third Party Defendants. The Plaintiff notes that the Defendant, as has been its past practice, has noted its motion well outside the boundaries of LR 7.1(h), in this instance on a single day's notice. The Plaintiff received notice of this motion purely as a result of the Plaintiff's counsel being notified by the Court's CM/ECF system. The Plaintiff notes that none of the Third Party Defendants are registered with the CM/ECF system. Assuming that the Defendant did not serve each of these individuals personally, it is highly likely that none of them have been given actual notice of this motion, and it is a certainty that neither the Plaintiff nor any of the Third Party Defendants were given notice as is required under FRCP 6(d). For that reason alone, the Defendant's motion should be denied. Indeed, the Court should inquire what steps, if any, the Defendant took to insure actual notice was given to the Third Party Defendants, and should not entertain this motion unless they were in fact given notice. In either event, the Plaintiff hereby requests a telephonic oral argument to give the Plaintiff the opportunity to explain its objection to the court in greater detail than allowed by the compressed schedule dictated by the Defendant's motion.

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Finally, if the Court is inclined to allow the Defendant to file yet another "statement of facts," the Court should insure that the Defendant's aren't using it to present more argument related to the Plaintiff's motion. The Court should do so by insuring that this second statement of facts is strictly limited to those facts which bear on the Defendant's "cross-motion" for summary judgment. The Court should accomplish this by bifurcating the Defendant's motion, so that it is heard after the Plaintiff's motion, and not allow this second statement of facts to be entered into the record until that time. Alternatively, as part of its order, the Court should make it a condition that the Defendant is prohibited from using any "facts" in its' second statement to oppose the Plaintiff's motion. The Defendant's second statement of facts should be strictly circumscribed to include only those that are relevant to the Defendant's cross motion for summary judgment, and any new "facts" used in it's opposition to the Plaintiff's motion should be stricken.

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CONCLUSION

The Plaintiff respectfully requests that the Court deny the Defendant's motion to file another statement of facts.

DATED this 17th day of October, 2005

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Certificate of Service

I hereby certify that on October 17, 2005, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Floyd Ivey, Peter J. Glantz, Sean Moynihan. I hereby certify that I have served the forgoing to the following non-CM/ECF participants by other means: Bonnie Gordon, Jonathan Gordon, James S. Gordon, III, Robert Prichett, Emily Abbey and Jamila Gordon.

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